

**WRITTEN TESTIMONY REGARDING HOUSE BILL 1639**  
**By THE WOMEN'S LAW PROJECT**  
**125 S. 9th Street, Suite 300**  
**Philadelphia, PA 19107**

**PRESENTED IN CONNECTION WITH THE HEARING OF**  
**THE PENNSYLVANIA HOUSE FAMILY LAW SUBCOMMITTEE**  
**ON FEBRUARY 4, 2010**

**I. Introduction**

The Women's Law Project (WLP) generally supports the proposed comprehensive revisions to Pennsylvania's custody law contained in House Bill 1639. We commend the hard work that has led to a number of positive changes to the custody law, which we discuss in detail below. We also offer recommendations for improving the bill, with an emphasis on better addressing the needs of the following populations: 1) children and their abused parents, 2) litigants whose economic circumstances make them unable to afford counsel and other costs involved in pursuing custody litigation, and 3) litigants whose literacy level impedes their ability to represent themselves. We appreciate your consideration of these comments.

**II. The Women's Law Project's Work Relating to Custody and Protection From Abuse**

The WLP's comments are informed by its experience responding to the needs of domestic violence victims and *pro se* litigants. The WLP is a public interest legal advocacy organization dedicated to advancing the rights and status of all women through high-impact litigation, advocacy, and education. An essential component of the WLP's advocacy is helping women in family law matters. Our telephone counseling service provides callers with individual counseling to assist them in navigating the complicated maze of Philadelphia Family Court. Over the past five years, we have responded to nearly 5,000 inquiries regarding custody. Two-fifths of these callers have also sought our assistance in dealing with domestic violence. Forty per cent have sought help with child support. Sixty-six per cent have wanted, but could not afford, a lawyer to help them.

We also pursue litigation and engage in policy advocacy to address systemic problems relating to child support, custody, and domestic violence. After decades of hearing callers recount difficulties navigating the family court process and negative experiences trying to present their cases in court, we undertook a two year comprehensive study of the court. In April 2003, we published *Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community*, in which we presented our findings and recommendations to improve the court's responsiveness to litigants. In 2005, we also published a comprehensive bench book for Pennsylvania judges on issues arising in custody cases where domestic violence is an issue. We also prepare and disseminate informational brochures and booklets.

### **III. The Importance of Making the Custody Statute Function Well for Vulnerable Pennsylvanians**

Based on our extensive experience with domestic violence victims, the WLP strongly believes that Pennsylvania's custody law should ensure that custody arrangements do not put children or their abused parents at risk of harm. For many abusers, custody has become a tool with which to inflict pain and manipulate the lives of victims. It is essential that abuse is carefully considered in making custody determinations and that children be protected from abuse through orders that provide adequate supervision and necessary restrictions on abusive parents' contact with those children. It is also necessary to ensure that custody orders do not create opportunities for batterers to further abuse their children's other parent.

HB 1639 improves the custody statute's response to domestic violence in many ways. By requiring the court to "include in the custody order safety conditions designed to protect the child or the abused party," §5323(e) will eliminate opportunities for abuse in the context of custody. By requiring orders to be sufficiently specific to enable law enforcement to enforce orders, §5323(f) will ensure that children are not wrenched from their custodial parents with no possible remedy until a hearing can be held, which in Philadelphia often means a delay of many months. Providing for no

presumptions between parents, §5327(a) will guarantee that abused parents are not at a disadvantage, as discussed in our comments on HB 463, submitted with this testimony. §5333(b)'s exemption of victims of abuse from joint counseling with their abusers will allow victims to safely participate in the custody process. By addressing harassing litigation, §5339 will protect victims of abuse from abusive litigation. HB 1639 can do more to fully address domestic violence.

Custody litigation can be extraordinarily expensive. Private counsel, evaluators and experts cost tens of thousands of dollars, putting those resources far out of the reach of most of our callers, and many citizens more generally. One alternative is legal services programs for low-income individuals, but they are far too understaffed to represent all who need their help. The least desirable option for coping with custody litigation—but often the only option—is for parents to litigate *pro se*. The family court process is complex, and parents in this position are anxious, frightened and woefully ill-equipped. Not only are they often unfamiliar with the court and the legal system, many parents lack the most fundamental communication skills. A 2003 study by the National Center for Education Statistics found that 13% of Pennsylvanians lack “*basic* prose literacy skills.” This figure jumps to 22% for Philadelphia.<sup>1</sup>

The reality is that in order to ensure that the best interests of children are served in custody decisions, the law and the legal process must be accessible to *pro se*, low income, and low literacy litigants. In its current form, HB 1639 makes the custody process more complex and costly by, for example, requiring litigants to prepare parenting plans. The WLP recommends that HB 1639 require courts to assist *pro se* litigants in understanding the steps to take and mandate the development of uniform statewide forms for all documents that must be filed or presented to the court. With these improvements, Pennsylvania will join the many other states who have taken such steps to assist

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<sup>1</sup> National Center for Education Statistics, National Assessment of Adult Literacy, State and County Estimates of Low Literacy (2003), <http://nces.ed.gov/NAAL/estimates/StateEstimates.aspx> (search for Philadelphia County in Pennsylvania).

unrepresented litigants (*e.g.*, New York, which provides simple, easy-to-read information about the law on the state court website.<sup>2</sup>)

#### **IV. Opportunities to Strengthen HB 1639**

The Women's Law Project recommends the following amendments to HB 1639:

**§ 5321.1. Declaration of Policy.** As set forth in HB 1639, the Declaration of Policy presumes that parents have been married or have lived together. For many of the people we see in Philadelphia, this is not the case. In addition, because the second sentence refers to parenting time separate and apart from the reference to the best interests standard in the first sentence, it appears to elevate parenting time above the best interest factors. We therefore recommend that the language be consolidated and changed as follows:

The General Assembly declares that it is the public policy of this Commonwealth, when in the best interest of the child, to maximize the child's time with each parent, to continue emotional and physical contact of the child with both parents, and to continue contact with grandparents when a parent is deceased, divorced or separated.

#### **§5322. Definitions**

**1. The Definition of Abuse.** HB 1639 narrowly limits the definition of "abuse" (§5322) to the definition provided in the Protection From Abuse (PFA) Act at §6102. In contrast, §5303(a) of the current law defines abusive conduct more broadly, as

present and past violent or abusive conduct which may include, but is not limited to, abusive conduct as defined under the act of October 7, 1976 (P.L. 1090, No. 218), known as the Protection From Abuse Act.

We urge the committee to retain the current custody law definition which, while cross-referencing the definition in the PFA Act, does not limit it to that definition. The PFA Act provides for extraordinary remedies, including eviction from one's home for the term of an order. The custody law, in contrast, does not have as its primary focus such extreme remedies. It

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<sup>2</sup> New York Court Help, <http://www.courts.state.ny.us/courthelp> (last visited Jan. 27, 2010).

should, however, give precedence in any determination of custody to safety. In this context, the current definition of abuse is essential to assuring that the court examines all expressions of abuse in the family.

**2. Shared Legal Custody.** We have two concerns with how shared legal custody is addressed in HB 1639:

**a) Definition of Shared Legal Custody.** §5322 defines “Shared legal custody” only as “The right of more than one individual to legal custody of the child.” It does not include the most basic element of shared legal custody which is the mutuality of the major decision-making involved, which must be made either by consensus or by allocation of the decisions involved between the parties. Nor does it describe shared legal custody in terms of the responsibility entailed in the right to custody. We recommend the definition be amended to state:

The mutual right, responsibility and involvement by both parents in major decisions regarding the child’s welfare.

**b) Specificity Regarding Decision-Making:** While HB 1639 provides for specificity of custody orders to facilitate law enforcement assistance in §5323(f), we believe that a greater obligation for specificity is needed when shared legal custody is awarded. The parent with physical custody of the child must be able to make decisions regarding the well being of the child when that parent is with the child and the other parent is unavailable. This is especially necessary when there is domestic violence and one parent may impede necessary decisions relating to the child’s care, such as thwarting the victim parent’s attempts to get the child needed medical care. We therefore recommend that §5323 regarding Award of Custody be revised to include a new subsection that states:

( ) Specificity of shared legal custody award.--When a court awards shared legal custody, it shall specifically describe the types of decisions which the parents must agree on, the types of decisions which a parent may individually make, and the manner in which the parents are to resolve disputes regarding decision-making.

**3. Supervised Physical Custody.** This term is new to HB 1639. Appearing at §5322, it replaces the current term, “Supervised Visitation.” We recommend retaining the current definition. Physical custody is not supervised; visitation is. Supervised visitation does not include decision-making (legal custody), nor does it permit the parent to take the child anywhere, engage in activities of his/her own choosing, or have private time with the child (physical custody). Supervised visitation is the mechanism by which someone receives an opportunity to spend time with a child when the court has determined that person cannot be alone with the child.

### **§5323. Award of Custody**

- 1. Interim Awards.** §5323(b), providing for interim custody awards, has the potential to immediately address safety in a custodial dispute. This potential should be made explicit, requiring a court to issue an interim custody award upon the request of a party after determining that the child would be at risk. Such orders are essential in situations where there is domestic violence.
- 2. Parties Living in the Same Residence.** In §5323(h), the bill addresses the situation of parties who live in the same residence. The bill establishes that such custody orders do not go into effect until one of the parties leaves the residence. We oppose this limitation. We have talked to many women over the years who cannot leave their abusers because of economic constraints, a reality that is all too relevant in the current economic times. They may be forced to remain in the same residence, but the high level of conflict and fear in the relationship means that a custody order is essential to the parties in making clear their

responsibilities and their time with the children. Further, we have also heard from women whose partners leave the home, only to return on the eve of the custody hearing so as to prevent our callers from getting custody orders, which the partners fear will lead to child support obligations.

### **§5328. Factors to be Considered When Awarding Custody: Best Interests Analysis**

- 1. The Relationship of Abuse to Other Factors.** HB 1639 provides sixteen factors to be considered in making a custody order (§5328). Abuse has appropriately been retained from the current custody law (§5303(a)) as one of these factors (§5328(a)(2)). However, the provision, as drafted, does not make clear how the abuse factor is to be considered in relation to the other fifteen factors required to be considered under §5328. This must be corrected to fully protect children and abused parents, as abuse may in fact affect how a battered parent will fare when these factors are considered by a court. The bill recognizes the impact of abuse with respect to the eighth factor, which addresses attempts by a parent to turn a child against the other parent and thirteenth factor, which requires consideration of conflict and ability to cooperate. However, abuse may affect each one of the factors. For example, abuse may impact the first and fifth factors as follows:

§5328(a)(1) requires consideration of “[w]hich party is more likely to encourage and permit continuing contact between the child and another party.” A party who has been abused by the other party may in fact not encourage continuing contact in the interest of protecting a child from the other parent. Without requiring abuse to be considered in evaluating this factor, an abused parent will be wrongly penalized for their efforts to protect themselves and their children. This is handled well in §5328(a)(13), relating to level of conflict and cooperation between the parties. It includes just such an exception.

§5328(a)(5) requires consideration of the availability of extended family. As abusers often seek to isolate victims from family and friends, his or her lack of connections to extended family will potentially be held against a victim of abuse unless the court is required to consider abuse when evaluating this factor.

To address these concerns, we recommend that §5328(a) in HB 1639 be revised to state:

(a) Factors.-- In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, while taking into account present and past abuse with respect to each factor. The factors to be considered shall include the following:

2. **The Impact of Abuse on Adults as well as Children.** In addition, in §5328(a)(8) and §5328(a)(13), where the legislation recognizes the impact of abuse on a particular factor, it does not require consideration of the parent's need to protect both the parent and the child.

The WLP recommends that the exception in both these factors be stated as follows:

. . . A party's effort to protect him or herself and the child from abuse by another party is not evidence of [(8) attempts to turn the child against the other party] [(13) unwillingness or inability to cooperate with the other party].

3. **§5328(a)(14). Drug and Alcohol History.** The WLP recommends that §5328(a)(14) in

HB 1639 be amended to state:

The history of drug or alcohol abuse of a party or member of a party's household, where the evidence demonstrates a specific and present risk of harm to the child after taking into consideration the rehabilitative efforts of the party or household member.

The more remote a party's history of drug or alcohol abuse, the less relevant it is as an indicator of a party's present parental abilities. Undue emphasis on a party's or household member's history of drug or alcohol abuse discourages individuals from undergoing treatment and is unfairly punitive to parents who have overcome these challenges in their

lives and undercuts Pennsylvania's interest in the rehabilitation of individuals struggling with substance abuse.<sup>3</sup>

- 4. §5328(a)(15). Mental and Physical Condition of Party or Household Members.** The WLP recommends that this factor be amended to also apply only if it directly affects the party's ability to parent by posing a specific risk of harm to the child as follows:

The mental and physical condition of a party or member of a party's household where the evidence demonstrates that such mental or physical condition poses a specific and present risk of harm to the child.

Without a showing of specific risk of harm, a party's or household member's mental and physical condition is irrelevant to child custody. Without such a showing, this subsection unfairly discriminates against parties who have physical or mental disabilities or who care for household members with physical or mental disabilities. As with substance abuse above, the inclusion of this factor — particularly without any requirement to show specific risk of harm to the child — may discourage parties with mental or physical conditions from seeking treatment.

- 5. §5328(b). Equitable Treatment.** The WLP supports gender-neutral judicial determinations and recommends that this subsection be broadened to include factors that are often associated with gender — gender stereotyping and access to economic resources — to ensure fair custody determinations for all parties involved. A court should not adhere to gender stereotypes when making custody determinations. Nor should a court base custody determinations on a party's access to economic resources as long as a party is able to provide for a child's basic needs. Consideration of such factors disadvantages women. Women as a class are traditionally economically disadvantaged in comparison to men due to structural

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<sup>3</sup> See, e.g., 35 Pa. Stat. Ann. § 780-118 (2009) (providing treatment for drug dependent individuals in lieu of criminal prosecution or punishment).

barriers in the workplace. In Pennsylvania, women earn only 74.7% of men's earnings.<sup>4</sup>

Child support is available to mitigate the economic disparity between parties, and social science research suggests that low-income families raise well-adjusted children as long as a child's basic necessities are met.<sup>5</sup> The WLP recommends that §5328(b) be revised to state:

Equitable Treatment. The court shall not make a determination under subsection (a) based on a party's gender, adherence to gender stereotypes, or access to economic resources.

**§5329. Consideration of Criminal Convictions.** The current custody law states:

If a parent has been convicted of or has pleaded guilty or no contest to an offense as set forth below, the court shall consider such criminal conduct and shall determine that the parent does not pose a threat of harm to the child before making an order of custody, partial custody or visitation to that parent (§5303(b)).

As set forth in HB 1639, §5329 eliminates the requirement that a court make a determination that the conviction poses no risk prior to making a decision regarding custody. We urge the reinsertion of this requirement into these sections of HB 1639.

A party's criminal history, particularly related to non-violent crimes such as prostitution, may bear little relevance to his or her present ability to parent, particularly if the criminal history is some years ago and a parent can demonstrate rehabilitation. Similarly, consideration of a non-party household member's criminal convictions unfairly punishes a party for another's conduct unless the court finds the household member poses a specific risk of harm to the child living in that home.

**§§5329(c), 5329(d), 5329(e), 5332, and 5333(d)**

- 1. The Cost of Evaluations, Counseling, and Informational Programs.** HB 1639 requires counseling in §§5329(d) and 5333(b), evaluations in §§5329(c) and 5329(e), and

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<sup>4</sup> U.S. Census Bureau, American Community Survey Reports, ACS—09, "Income, Earnings, and Poverty Data from the 2007 American Community Survey" 12 (2008).

<sup>5</sup> See R.E. Bulanda, *Beyond Provisions: The Relationship Between Poverty Status and Parenting Among Single Mothers*, 42 Marriage & Family Rev. 63 (2007).

informational programs in §5332. In all cases, the bill permits the court to assess the costs to the party or parties. This raises a major concern regarding low-income litigants. The costs associated with these types of programs are often exorbitant and well beyond the means of all but the wealthiest litigants. The bill does not require that courts establish programs, only that they may require litigants to attend them. This means that, in most communities, only private resources are available. We therefore recommend that HB 1639 be amended to require courts to identify free resources for litigants, refer litigants to these resources, and waive fees for court provided services when a litigant demonstrates inability to pay.

**2. Qualifications of Those Providing Evaluations, Counseling, and Informational**

**Programs.** HB 1639 does not discuss the necessary qualifications of those who would provide these services. This raises important questions about the appropriateness of varying credentials and the role of these professionals in offering testimony and submitting to cross-examination. At a minimum, we recommend that HB 1639 require the promulgation of rules that establish minimum qualifications for those providing these services.

**§5331. Parenting Plans.** §5331 of HB 1639 requires that in all contested cases, each party must develop a parenting plan. The bill goes on to specify eight areas of parenting that must be addressed in these parenting plans. We are concerned that developing such a detailed and comprehensive written document would be beyond the capacity of individuals who cannot afford counsel and/or have low literacy. The inability to produce such a document on his or her own has little relevance to an individual's ability to parent. We therefore recommend that HB 1639 be revised to include provisions requiring the court to provide meaningful assistance free of charge to individuals unable to afford counsel, including the development of statewide model plans that can be completed by filling in the blank and informational brochures that explain the process as well as assisting individual litigants in developing the plans. Furthermore, we urge that the law include a mechanism

for handling parenting plans where there has been domestic violence. A number of other states have taken one or all of these steps, often making this information available on their state court websites.

For example:

- **Oregon** provides information about parenting plans, as well as forms and instructions.<sup>6</sup> The Oregon guidance is the most comprehensive we have found. It includes a form and instructions for a basic parenting plan (offering several options and forms to address variation from the norm), a safety checklist and safety-focused parenting plan (again with multiple model plans and instructions), and forms and instructions for parents who live in different communities.
- **Arizona** offers a 68-page booklet on how to prepare parenting plans, with 14 model schedules and information on child development, and provisions for the handling of domestic violence.<sup>7</sup>
- **Alaska** provides information on parenting plans<sup>8</sup> and provides more detailed information and resources relating to domestic violence.<sup>9</sup>
- **West Virginia** has worksheets and instructions for preparing parenting plans.<sup>10</sup> West Virginia also requires the court to develop a process for identifying cases where there is child abuse or neglect or domestic or family violence. The court must provide appropriate

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<sup>6</sup> Oregon Courts, Oregon Judicial Department, Parenting Plan Information, <http://courts.oregon.gov/OJD/OSCA/cpsd/courtimprovement/familylaw/parentingplan.page> (last visited Jan. 27, 2010).

<sup>7</sup> Arizona Supreme Court, Administrative Office of the Courts, *Planning for Parenting Time: Arizona's Guide for Parents Living Apart* (2009), <http://www.supreme.state.az.us/nav2/ParentingPlansWorkgroup/Documents/PPWguidelines.pdf>.

<sup>8</sup> Alaska Court System, Self-Help Center: Family Law, Parenting Plans, <http://www.courts.alaska.gov/parenting.htm> (last visited Jan. 27, 2010).

<sup>9</sup> Alaska Court System, Self-Help Center: Family Law, Domestic Violence, Stalking or Sexual Assault, <http://www.courts.alaska.gov/shcdv.htm> (last visited Jan. 27, 2010).

<sup>10</sup> West Virginia Supreme Court of Appeals, Index of Forms for Family Court Proceedings, <http://www.state.wv.us/WVSCA/rules/FamilyCourt/index.htm> (last visited Jan. 27, 2010).

resources and must meet a statutory standard for court review of parenting plans in these cases.<sup>11</sup>

- **Tennessee’s** Office of Courts has issued a form for use in creating all parenting plans.<sup>12</sup>
- **Montana** provides forms and instructions for developing parenting plans.<sup>13</sup>
- **Massachusetts** offers a 23-page brochure on shared parenting.<sup>14</sup>

**§5334 and 5335. The Need for Child Advocates and Guardians *Ad Litem* in Certain**

**Custody Cases.** We applaud the effort to address the need for children to have representation or a guardian *ad litem* in some custody cases (§5334, 5335). We are concerned that the standard for appointment child advocates and guardians *ad litem* of “substantial abuse” is too high. We believe that children need these types of assistance and support in any case where there has been even one allegation of abuse.

**§5336(b). Confidentiality and the Future Safety of Domestic Violence Victims and Their**

**Children.** We applaud the effort to protect the confidentiality of victims of domestic violence in §5336(b) with regard to access to records and other information in a custody case. §§(b)(1) and (b)(2) protect address information, presumably to protect a victim of domestic violence at risk of further violence from being found by her abuser. Since abusers are able to find their victims location through other means, we recommend this provision be expanded to include confidentiality of telephone numbers, school districts, and medical providers as well.

**Relocation Requirements.** While we agree with certain aspects of the relocation requirements in §5337, we are concerned that they may be too complicated for litigants who lack representation and

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<sup>11</sup> W. Va. Code § 48-9-205 (2009).

<sup>12</sup> Tennessee’s Parenting Plan, <http://www.tsc.state.tn.us/geninfo/programs/Parenting/Parenting.htm> (last visited Jan. 27, 2010).

<sup>13</sup> State Law Library of Montana, Child Custody—Parenting Plans—Visitation, <http://courts.mt.gov/library/topic/childcustody.mcp> (last visited Jan. 27, 2010).

<sup>14</sup> Massachusetts Chapter of the Association of Family and Conciliation Courts, *Planning for Shared Parenting: A Guide for Parents Living Apart* (2005), <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/afccsharedparenting.pdf>.

have low literacy levels. We recommend that HB 1639 require the Administrative Office of Pennsylvania Courts to develop written informational materials in multiple languages that explain the relocation process, post them on its website, and provide them to Pennsylvania courts to make available to court consumers.

The Women's Law Project is grateful for the opportunity to share this information with the Committee and remains available to assist the Committee in any way it can to further the best interests of Pennsylvania's children.